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BY:

Kelly Gresham

IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA,

V1300CR201080049

Plaintiff,

vs.

RESPONSE TO DEFENDANT'S
REQUEST FOR WILLITS INSTRUCTION

JAMES ARTHUR RAY,

(The Honorable Warren Darrow)

Defendant.

The State of Arizona objects to Defendant's Request for a *Willits* Instruction. The State has not failed to preserve, lost, or destroyed any potentially exculpatory evidence. Defendant's claim to the contrary is purely speculative and Defendant's request should be denied for the reasons set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Relevant Facts

Defendant's motion does not argue the State failed to preserve any evidence. Defendant claims the State did not preserve enough evidence and failed to adequately test the evidence it did seize. Defendant's motion ignores the fact that despite YCSO's seizure of rocks, wood, water, tarp and blanket samples, and dirt samples, Defendant has never requested to test any of the items seized despite their availability to Defendant to do so. In addition, the medical examiners preserved samples from each of the victims that have also been available for Defendant to test.

1 Based on the findings of the medical examiners, the State had no reason to believe the
2 victims' blood needed to be tested for any toxins. Nor, apparently, did the doctors who treated
3 the victims and the other participants who suffered injuries from Defendant's extreme heat event.
4 While it is true that toxins were initially suspected when medical providers became aware of the
5 mass casualty event, according to the participants' medical records not a single participant was
6 ever tested for any toxin other than carbon monoxide,¹ which was quickly eliminated as a
7 possibility. Even the statement heard the evening in the dining hall was very tentative as to the
8 cause of the injuries: "*We're not exactly sure why*, could have been some carbon monoxide with
9 maybe some organo-phosphates maybe that were mixed in somehow." *Trial Exhibit 692,*
10 *Transcript of Det. Parkinson's Interview of Michael Barber, 10/8/09 at 8:28 – 9:1 (emphasis*
11 *added).*

12 As Detective Diskin has testified, when he first was assigned to the investigation, he did
13 not know what had caused the deaths and illnesses of the participants and believed a toxin might
14 be a factor. Accordingly, he obtained samples he believed adequately represented the materials
15 used to conduct the event, including rocks, wood, interior poles, sections of the coverings, water,
16 and even dirt from both inside and outside of the lodge. The rocks, wood, poles and coverings
17 were sent to the lab for testing. Criminalist Dawn Sy testified she only sampled half of the items
18 sent in order to ensure items remained available for Defendant to test.

19 From the date of the event forward, investigators were told it was only in James Ray
20 sweat lodge events that people suffered any type of medical distress. This was true when the
21 exact same structure was used and was also true when other structures in the same location were
22 used. As the investigation continued, it became more and more evident to Detective Diskin that
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¹The medical records do indicate that some participants were screened for narcotics and other
drugs that are commonly abused.

1 the extreme nature of Defendant's sweat lodge event was the most probable cause of the victims'
2 death. Accordingly, after the initial testing by the DPS laboratory, additional testing was not
3 pursued and the investigation focused on the history of Defendant's sweat lodge events at Angel
4 Valley.

5 Defendant first revealed some details pertaining to his causation defense at the interview
6 of Dr. Paul on 31 January 2011. Had Defendant disclosed the true basis of his causation defense,
7 the State could have requested additional testing be performed, specifically for
8 organophosphates. In fact, the State did test the blood of the victims for organophosphates after
9 Dr. Paul's interview; however, it was later informed that the blood tests results could not be
10 relied upon due to the time that had elapsed from the victims' death. While a defendant may not
11 be required to disclose the details of his defense to the State, he should not be allowed to exploit
12 his lack of candor into justifying a *Willits* instruction.

13 In any event, defendant's expert witness, Dr. Paul, testified that organophosphates
14 metabolize very quickly, and may only remain in samples for a matter of hours or days.
15 Defendant's other trial witness, criminalist Dawn Sy, testified she would not recommend that
16 YCSO should have seized the entire sweat lodge.

17 II. Law and Argument

18 A *Willits* jury instruction is sometimes imposed as a sanction when evidence is destroyed.
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20 See, e.g., *State v. Bocharski*, 200 Ariz. 50, 59 P43, 22 P.3d 43, 52 (2001) (upholding the trial
21 court's *Willits* instruction). In *State v. Willits*, the Arizona Supreme Court upheld a jury
22 instruction allowing the jury to draw an inference that evidence would have been unfavorable to
23 the state if the jury found that the state lost, destroyed, or did not preserve evidence that might
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1 aid the defendant and the state's explanation was inadequate. *State v. Willits*, 96 Ariz. 184, 393
2 P.2d 274 (1964).

3 To receive a *Willits* instruction, a defendant must prove both: (1) that the State failed to
4 preserve material evidence that was accessible and might tend to exonerate him, and (2) that
5 prejudice resulted from the failure to preserve the evidence. *State v. Fulminante*, 193 Ariz. 485,
6 503, 975 P.2d 75, 93 (1999); *State v. Leslie*, 147 Ariz. 38, 47, 708 P.2d 719, 728 (1985).
7 Although the State has a duty "to preserve evidence that is obvious, material and reasonably
8 within its grasp," *State v. Tyler*, 149 Ariz. 312, 317, 718 P.2d 214, 219 (1986), the State
9 ordinarily does not have an affirmative duty to seek out and develop exculpatory evidence. *State*
10 *v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987). A *Willits* instruction is not given
11 merely because a more exhaustive investigation could have been made. *State v. Murray*, 184
12 Ariz. 9, 33, 906 P.2d 542, 566 (1995); *State v. Willcoxson*, 156 Ariz. 343, 346, 751 P.2d 1385,
13 1388 (App. 1987).
14

15 Defendant's decision to have no testing performed of the samples taken from the crime
16 scene negates both prongs of the *Fulminante* test. Moreover, Dr. Paul's testimony regarding the
17 very short time that organophosphates could be found in samples, and Ms. Sy's testimony that
18 she would not have advised seizing the entire sweat lodge, further negates the first prong of the
19 *Fulminante* test.
20

21 **A. The State had no duty to preserve additional evidence.**
22

23 The State's duty to preserve evidence is "limited to evidence that might be expected to
24 play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488
25 (1984). To be constitutionally material, the evidence's exculpatory value must have been
26 "apparent before the evidence was destroyed" and the defendant must be "unable to obtain

1 comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 488 (internal
2 citations omitted); *State v. Schad*, 163 Ariz. 411, 415– 416, 788 P.2d 1161–62 (1989), citing
3 *Trombetta*; *State v. Tucker*, 157 Ariz. 433, 442, 759 P.2d 579, 588 (1988), citing *Trombetta*.

4 In this case, YCSO seized what they believed to be a representative sample of the
5 materials used in conducting the sweat lodge. After seizing what it believed to be sufficient,
6 Detective Diskin released the crime scene. This is a standard practice for all law enforcement
7 agencies investigating criminal matters. By way of analogy, when a homicide occurs in a house,
8 officers do not seize the entire house. The fact that Defendant claims additional evidence up to
9 and including the entire sweat lodge should have been preserved does not establish a duty for
10 law enforcement. As noted previously, a *Willits* instruction is not given merely because a more
11 exhaustive investigation could have been made. *Murray, supra* at 33, 906 P.2d at 566.

12 As the Court of Appeals noted in *Willcoxson*:

13 Indeed, in almost every case prosecuted, the claim can be made that the
14 investigation could have been better. We do not believe that a failure to pursue
15 every lead or gather every conceivable bit of physical evidence will require a
16 *Willits* instruction.

17 *Willcoxson* at 346, 751 P.2d at 1388. It is significant to note, that although Defendant has
18 repeatedly emphasized how little of the materials used in the sweat lodge were seized, he has
19 never requested to test the evidence that exists. There is no support for Defendant's claim that
20 the investigators failed to preserve material evidence.

21
22 **B. The State is not obligated to test evidence.**

23 Defendant also claims a *Willits* instruction is merited because the State failed to test
24 certain evidence. As noted previously, the evidence seized (including autopsy samples from the
25 victims) have been and are available to the Defendant for testing. The fact that neither the State
26 nor Defendant elected not to perform tests on the evidence does not support a *Willits* instruction.

1 "Having preserved the evidence and given the defendant an opportunity to test it, the state does
2 not violate due process by failing to perform any tests." *State v. Lopez*, 163 Ariz. 108, 113,
3 113P.2d 959, 964 (1990).

4 **C. Defendant's claim is based on speculation.**

5 Defendant's claim that if additional evidence had been preserved and tested the results
6 would have supported his defense that a toxin caused the death of the victims is entirely
7 speculative and is not supported by the evidence. "A trial court does not abuse its discretion by
8 denying a request for a *Willits* instruction when a defendant fails to establish that the lost
9 evidence would have had a tendency to exonerate him." *State v. Fulminante*, 193 Ariz. 485, 503,
10 975 P.2d 75, 93 (1999); see *State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996)
11 (No error in denying request for *Willits* instruction when the defendant's claim that the destroyed
12 or lost files would have supported his theory of the case was entirely speculative.); *State v.*
13 *Davis*, 205 Ariz. 174, 180, 68 P.3d 127, 133 (App. 2003) ("Defendant's contentions that these
14 items might have produced potentially exculpatory evidence, such as fingerprints, is sheer
15 speculation at best).
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18 The facts in this case are far different from the cases cited by Defendant. For example, in
19 *State v. Hunter*, 136 Ariz. 45, 664 P.2d 195 (1983), the police allowed a friend of the victim to
20 pick up and wipe off a pair of scissors found near the body of the victim before they could be
21 tested for latent fingerprints. The defendant alleged that the victim had attacked him with
22 scissors and he was defending himself when he stabbed the victim with a knife. *Id.* at 47, 664
23 P.2d at 197. In finding a *Willits* instruction should have been given the court found that the
24 victim's fingerprints on the scissors would have corroborated the defendant's claim that the
25 victim attacked him with the scissors. *Id.* at 51, 664 P.2d at 195.
26

1 In the instant case, there is no evidence that organophosphates were ever used at Angel
2 Valley. In fact, the testimony during trial was to the contrary. Moreover, the few pesticides and
3 rat poisons identified as being used at Angel Valley would not cause the symptoms experienced
4 by the victims. In addition, Dr. Paul testified whatever toxin might have been in the sweat lodge
5 would not have been airborne, but would have been in direct contact with the skin or the faces of
6 the participants as his explanation as to why all of the participants had not suffered distress. This
7 testimony eliminates any claim that treated wood or something on the rocks might have been a
8 source of a toxin since the wood was never in the sweat lodge and the only participant to come in
9 contact with the rocks was Lou Caci who suffered burns, not toxic poisoning. This leaves the
10 dirt and the coverings as possible sources for the unidentified toxins. Mr. Mercer testified he
11 saw rat poison stored with the coverings; however, Dr. Dickson testified that rat poisons would
12 not cause the symptoms experienced by the victims. Essentially only the dirt remains as a
13 possible source. Dawn Gordon testified she remained close to the ground to escape the heat and
14 that she was right next to Kirby Brown and James Shore and was fine. Based on these facts,
15 Defendant's claim that if additional evidence had been seized and tested it would have supported
16 the theory of his case must be rejected as speculative and not supported by the trial testimony.

19 III. CONCLUSION

20 The State has not lost or destroyed potentially exculpatory evidence in this case.
21 Defendant claims he is entitled to a *Willits* instruction because the State did not seize enough
22 evidence and/or did not test the evidence it did seize for organophosphates. Defendant's claim
23 that the seizure of additional evidence or additional testing would have supported a defense that
24 organophosphates killed the victims, is purely speculative and is not supported by the evidence.
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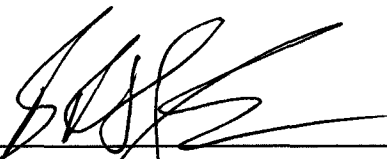
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1 Defendant purposely elected not to test the evidence that was seized and is not entitled to a
2 *Willits* instruction as a result. Defendant's motion should be denied.

3 Respectfully submitted this 13th day June, 2011.

6 By


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9 Copies of the foregoing emailed this
10 13th day of June, 2011:

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